

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRTIETH REGION

Hartford, Wisconsin

**HARTFORD CARE CENTER, A SUBSIDIARY OF I.H.S.  
ACQUISITION #145 INC., A WHOLLY OWNED  
SUBSIDIARY OF INTEGRATED HEALTH SERVICES, INC.<sup>1</sup>**

**Employer**

**and**

**Case 30-RC-6112**

**SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 150, AFL-CIO<sup>2</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,<sup>3</sup> the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will

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<sup>1</sup> The name of the Employer appears as amended at hearing.

<sup>2</sup> The name of the Petitioner appears as corrected at hearing.

<sup>3</sup> Timely briefs from the Employer and Petitioner have been received and duly considered.

effectuate the purposes of the Act to assert jurisdiction herein.<sup>4</sup>

3. The Labor Organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

### **ISSUES**

The Petitioner seeks to represent employees in the following unit:

All registered nurses, licensed practical nurses and graduate nurse/Bachelor of Science Nursing employed by the Employer at its Hartford, Wisconsin facility; but excluding all office and clerical employees, confidential employees, guards and supervisors as defined in the Act.

The parties agree that the bargaining unit should include licensed practical nurses (hereafter LPNs) but contrary to the Petitioner, the Employer asserts that the registered nurses (hereafter RNs) are supervisors as defined in the Act. Consistent with its position the Employer, contrary to the Petitioner, asserts the graduate nurse is also a statutory supervisor. The Employer also asserts that the restorative nurse (sometimes referred to as the rehab nurse) an LPN, is a supervisor as defined in the Act.

### **FACTS:**

#### **Background**

The Employer as noted is located in Hartford, Wisconsin and operates a 100 bed long term skilled nursing care facility. The facility operates on a 24 hour per day basis, seven days

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<sup>4</sup> The Employer, a Delaware corporation, is engaged in the operation of a nursing home at its Hartford, Wisconsin facility. During the past calendar year a representative period, the Employer derived gross revenues in excess of \$250,000, and during that same period purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Wisconsin.

per week. The facility maintains a three shift operation, described as day or a.m. shift (6 a.m. to 2:30 p.m.), p.m. shift (2 p.m. to 10:30 p.m.) and night shift (10 p.m. to 6:30 a.m.).

The Employer's operations are directed by its administrator Barry Metevia, who oversees all of the facility's operations. Under the administrator, is an administrative assistant, Sue Vincent, who acts as administrator in the administrator's absence. The various department heads including: maintenance, housekeeping, laundry, activities, dietary, therapy, business office, social services, medical records, central supply, scheduling and nursing report to the administrator.

The Union represents employees in a service and maintenance unit more specifically described as follows:

All employees of the Employer excluding Registered Nurses, professional employees, confidential employees, office clerical employees, guards and supervisors, as defined in the Act.

The employees in the above described unit are covered by a current collective bargaining agreement effective from September 1, 1997 until August 31, 2000. The Union seeks to represent certain additional individuals within the nursing department, where it already represents certified nursing assistants. (hereafter CNAs, but contractually described as nurse aide). The parties stipulated there is no history of collective bargaining for the individuals in dispute and there is no contract bar to an election herein.

The nursing department is headed by a Director of Nursing (DON), currently Tammara Corcoran. Reporting to the DON is a scheduler (Joani Fraley). Although currently unoccupied, the Employer has typically employed at least one Assistant Director of Nursing (ADON) and sometimes two. In addition it appears there are several other managerial/coordinator positions in the nursing department including the clinical care coordinators recently occupied by Judy Schaeffer and Fran Schlindwein. (Employer Exhibit 7(h).) Schaeffer was also described as the

MDS coordinator and Schlindwein as infection control staff development nurse. (Employer Exhibit 7(i).) Employer Exhibit 7(h) also reflects the title “management nurse on call Judy [Schaeffer].”

The Employer’s facility is two stories and has 5 resident wings or units where the nursing department employees normally function. Wings 1, 2 and 3 (the front wings) contain residents that are primarily stable. Wing 4 (north end) is described as a cognitively impaired unit with most of the residents having been diagnosed with Alzheimer’s or dementia. Wing 5, located downstairs, is a Medicare certified unit, and its residents have more acute medical conditions. Residents of this wing receive therapies and require greater technical expertise for their care.

Within the nursing department there are approximately 8 RNs (two are part-time), 13 LPNs and approximately 35 CNAs. Also in the nursing department and in dispute in this proceeding is the graduate nurse, (or nurse intern) Sherry Ziegelbauer and the rehab or restorative nurse, Linda Boudry<sup>5</sup> The RNs work in positions variously described as supervisor, nursing supervisor, or charge nurse. LPNs generally work as charge nurse but on occasion are identified as a nursing supervisor. On the Employer’s schedules, either RNs or LPNs may be identified generally as nurse.

Described below are the typical staffing patterns for 1<sup>st</sup> and 2<sup>nd</sup> shift by wing.

1<sup>st</sup> Shift and 2<sup>nd</sup> Shift

<i>Wing 1</i>	<u>1 RN or LPN, 1 CNA</u>
<i>Wing 2</i>	<u>1 RN or LPN, 2 CNAs</u>
<i>Wing 3</i>	<u>1 RN or LPN, 2 CNAs</u>
<i>Wing 4</i>	<u>1 RN or LPN, 2 CNAs</u>

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<sup>5</sup> The graduate nurse is someone who has passed the clinical or educational requirements as a registered nurse but has not yet passed their nursing board examinations.

*Wing 5*      Usually 1 RN and 1 CNA

According to DON Corcoran on third shift there are either 2 or 3 nurses (either RNs or LPNs) and 4 or 5 CNAs. One of the nurses will be assigned to wings 1, 2 and 3 usually with 2 CNAs. The other nurse will be assigned to wings 4 and 5 and one CNA each will be assigned to each wing. Generally on second and third shift there will be at least one RN on duty.

Duties in the nursing department are shared by the RNs, LPNs and CNAs with the evidence reflecting a team effort. The duties performed by each classification are in large part dictated by education and training (further reflected by the nurse's license). The CNAs perform basic resident care tasks. They assist residents with getting them washed, dressed and up in the morning. They assist in taking residents to and from the dining room and with meals. CNAs also assist residents with toileting and turning. CNA duties include providing direct "hands on" care that the residents require.

LPNs (typically performing in a charge nurse capacity) pass medications and "assist with the supervision of CNAs.". LPNs do clinical assessments for residents and document the residents' condition as required. They also assist with doctor calls and respond to family concerns. According to DON Corcoran, "[t]hey [charge nurse, either LPNs or RNs] should make out the assignment sheets for the CNAs, assigning break times, meal times."

DON Corcoran provided the following general description of the duties of the RN supervisor:

RN supervisor oversees primarily the clinical operations in the building during her shift of duty. She has the supervisor key ring. [which includes keys to building and emergency medicine and narcotic supplies]. She has access to the contingency and IV supplies. She gives and gets report. She receives report from the off going shift and she gives report to the oncoming charge nurses on the floors. She supervises the charge nurses in the building and helps to oversee the supervision of the CNAs in the building as well.

The record reflects that all RNs (except for the graduate nurse) have functioned as RN supervisor and that most do so regularly.<sup>6</sup> The RNs also perform procedures requiring greater medical expertise such as IV treatment (although LPNs can be certified in such procedures).

In the following discussions I will in greater detail describe the duties performed by RN supervisors that impact on their statutory supervisory status.

**Supervisory factors:**

The Employer does not assert and the record does not establish that nurse supervisors hire, layoff, recall or promote other employees, or effectively recommend such actions. Thus, a determination of supervisory status depends upon consideration of the other indicia listed in Section 2(11) of the Act.

**Staffing Responsibilities:**

According to the Employer “One of the RN Supervisor’s primary concerns is to ensure that the facility is adequately staffed . . .” and toward that end she has the authority, to and does, require employees to work overtime, require employees to report to work, require employees to work through their lunch breaks, and allows employees to leave early. (Employer’s Brief at page 4) The Employer also asserts and offered general testimony that RN supervisors offer and approve bonus payments to induce employees to work extra and unscheduled shifts, and to call outside staffing services for additional temporary help.

The record, when viewed as whole, more accurately reflects that the RN supervisor’s staffing responsibilities are substantially limited by Employer policy and contract. The RN supervisor and charge nurses and available nursing staff on a team basis try to resolve staffing shortages. If additional staff is needed volunteers are sought and any available nursing department staff member may contact employees. According to the parties’ contract, CNAs who

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<sup>6</sup> According to RN Kathy Upson she has been RN supervisor only twice.

are “off” may refuse to come in to work. The nurse department schedule is prepared by the scheduler in conjunction with the DON. At least one recent written schedule (Petitioner Exhibit 1) explicitly states “These schedules are not to change unless authorized by Tammy [DON Corcoran].” Bonus payments to induce staff to work extra shifts are pre-arranged and are based upon a volunteer sign-up sheet prepared by the Employer. Subsequent call-ins are based upon those pre-arrangements. Breaks and lunch are arranged with the charge nurse (who can be either an LPN or RN) and are informally scheduled with the departing CNA, or nurse advising other staff, to insure someone is covering the wing. Work assignments for residents are routine and are predetermined based upon detailed case instructions for each resident. Those care instructions are based upon “care plans” developed by the MDS coordinator and DON. Those care plans are also reflected in “care cards” displayed at the resident’s room.

The record reflects that both RN supervisors and charge nurses (LPNs or RNs) routinely initial “time clock adjustment” forms for employees. These forms are submitted to the Employer and are used to adjust employee time records if employees work through lunch, stay late, or if there are time clock difficulties. Both RNs and LPNs also sign outside agency staff time sheets verifying the work times. Absentee reports are also routinely prepared by nurses.

### **Discipline**

The Employer asserts that the RN supervisors have the authority to discipline employees both verbally and in writing. The Employer further asserts the RN supervisors have the authority to suspend employees and recommend terminations.

The record reflects that both RNs and LPNs give verbal “warnings.” They both prepare written reports submitted to the DON (or her subordinate). All discipline of consequence is handled by the DON. Formal discipline has occurred very infrequently. No written discipline is

in evidence in this matter. Thus, there is no evidence that these written reports involve any effective recommendation or independent consequence. In certain defined circumstances, such as patient abuse, the nurse supervisor can direct that an employee be sent home. The DON is contacted in such cases and she conducts an independent investigation and determines what, if any, further actions occur. The record reflects that RN supervisors have had no involvement in the contractual grievance procedure affecting CNAs.

### **Evaluations**

Recently, the Employer has provided RN supervisors with evaluation forms to complete for CNAs and LPNs. The forms were provided without detailed instructions regarding completion or impact. One of the forms was introduced into evidence and provides no indication what, if any, impact it has. It also appears wage rates for CNAs are the subject of bargaining and are contractually determined.

### **Wages and Other Conditions**

All the employees involved herein are hourly paid, and punch a time clock. (unlike the DON). CNAs start at \$8.55 per hour; LPNs start at \$12.50 to \$15.00 per hour depending upon experience; and RNs start at \$15.00 to \$20.00 per hour, again, depending upon experience. All the involved employees share similar benefits. They are all required to work periodic weekend shifts. RN supervisors receive no additional pay when they are designated as RN supervisors.

### **The Graduate Nurse**

The graduate nurse's duties are not distinguishable from the other RNs. The current graduate nurse Sherry Ziegelbauer as noted has not yet passed her nursing board examination. She performs RN duties but does so under the direction of another RN. Ziegelbauer has been a charge nurse but has not served as a nurse supervisor.

### **The Restorative Nurse**



According to the Employer, the restorative nurse's authority is "similar" to that of RN supervisors including the purported authority to "discipline," "evaluate" and "recommend termination." Evidence of exercise of this authority does not appear in the record.

### **Analysis and Conclusions**

Following *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994) , the Board restated the applicable principles for determining supervisory status in the health care industry. The Board noted:

In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with "genuine management prerogatives," and "straw bosses, lead men, and set-up men" who are protected by the Act even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.* 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 (1947)). Senate Rep. No. 105 also stated that the committee took "great care" that employees excluded from the coverage of the Act "be truly supervisory" and that the amendment excluded only "the supervisor vested with such management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such actions." NLRB Legislative History of the Labor Management Relations Act of 1947, 410. "Responsibility to direct" was added to the Senate bill shortly before its enactment by Senator Flanders, who explained that it was added to include "essential managerial duties" not otherwise covered by other indicia. Leg. Hist. At 1303. *Providence Hospital*, 320 NLRB 717, 725. (1995)

See also *Ten Broeck Commons*, 320 NLRB 806 (1996). The above cases require the application of the Board's traditional analysis in determining whether the RNs are statutory supervisors. Accordingly, I need to determine whether the RNs herein exercise "true supervisory power." In a decision adopted by the Board an administrative law judge fairly described the task:

Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a "title and theoretical power to perform one or more of the enumerated functions." *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4<sup>th</sup> Cir. 1958). Cert. Denied 359 U.S. 911 (1959). That is relevant is the actual authority possessed and not the conclusionary assertions of witnesses. And while

the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also “states the requirement of independence of judgment in the conjunctive with what goes before.” *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5<sup>th</sup> Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely “routine,” “clerical,” “perfunctory” or “sporadic” manner does not elevate rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146-149 (5<sup>th</sup> Cir. 1967). Nor will the existence of independent judgment alone suffice; for “the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act. See *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1<sup>st</sup> Cir. 1948). In short, “some kinship to management, some sympathetic relationship between employer and employee, must exist before the latter becomes a supervisor of the former. “*NLRB v. Security Guard Service*, supra. *Amperage Electric, Inc.*, 301 NLRB 5, 13 (1991).

Additionally, providing someone with a title - RN supervisor - is not dispositive of supervisory status. *Polynesian Hospitality Tours*, 297 NLRB 228 (1989). Under Board precedent, the burden of establishing supervisory status is on the party seeking to exclude the individual as a supervisor. *Bennett Industries Inc.*, 313 NLRB 1363 (1994).<sup>7</sup>

The Employer has not challenged the supervisory status of the LPNs, at its facility. Likewise, the Employer does not assert the disputed employees have authority to hire, layoff, recall, promote or discharge other employees. (Although, the Employer apparently argues RN supervisors could effectively recommend discharge.) I have considered and discuss below the other factors indicative of supervisory status.

### **Staffing Responsibilities:**

The Employer asserts that the RN supervisors’ staffing responsibilities establish their supervisory status. The Employer asserts such authority is reflected in the RN’s role in: securing employee overtime, requiring employees to report to work, requiring employees to work through

lunch and allowing employees to leave early. The Employer also contends RN supervisors offer and approve bonus payments to employees who work extra shifts and call in temporary help. Additionally, the Employers asserts RN supervisory authority is reflected by their involvement with “time clock adjustment” forms.

The Employer further asserts the above described conduct reflects the exercise of independent judgment. I disagree. The activities of the RN supervisors described above are exercised routinely and within narrow guidelines. The authority exercised is similar to conduct the Board has found insufficient to establish supervisory authority. First, the Employer’s staffing is established by the scheduler in conjunction with the DON. Recently employees have been advised, “These schedules are not to change unless authorized by Tammy [Corcoran, DON].” Rather than “require” employees to work overtime or report to work, as asserted by the Employer, it appears staffing problems are resolved informally. DON Corcoran described the process as follows: “If they are short a nurse, the nursing supervisor may ask one of the charge nurses to stay over. . .” Concerning overtime, the parties’ collective bargaining agreement, which covers CNAs, specifically provides “off employees. . .may refuse to come in.” It also appears that the decision to work through lunch is based upon resident needs. Employees may leave work because of illness but it does not appear RN supervisors (or charge nurses) exercise discretion in permitting such actions. Testimony from RNs establish “. . . the DON has the final say if that person can go home or not.”

Regarding authority to offer a bonus to work on extra shifts, RN supervisors have no independent authority. Bonus offers are pre-authorized by the Employer’s administration and employees voluntary sign-up for such prospective assignments. Although the Employer claims RN supervisors can call in temporary pool help, the record does not support that assertion. To

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<sup>7</sup> The Employer cites contrary authority from the United Court of Appeals for the Sixth Circuit. I am bound by

the contrary there are significant limitations. RN supervisor George-Peterke sought authority from the DON to secure pool help and was advised “she [DON] said she had to get approval from the administrator.”<sup>8</sup>

In establishing supervisory authority, the Employer also relies on a number of “Time Clock Adjustment” forms of employees initialed by RN supervisors. These forms reflect acknowledgment of claims for overtime by employees in circumstances such as working through lunch or staying late. LPNs also initial such forms. This function is clerical in character and merely reflects a time keeping function.

The Board has found RNs (and LPNs) exercising similar authority not to be supervisors. In *Illinois Veterans Home at Anna LP*, 323 NLRB 890 (1997), the Board reversed a Director’s supervisory conclusions. The Board initially found, like the situation here, the CNAs’ assignments were generally well established and based upon previously prepared instructions. The Board concluded alterations in these basic assignments were “not indicative of supervisory status.”

With respect to staffing shortages the Board found resolution occurred primarily through a volunteer process. The Board also specifically found:

Contrary to the Regional Director, we find that the RNs apparent authority to select, and if necessary, to require, employees to work overtime fails to show supervisory status. First, the RNs apparently are generally successful in finding volunteers either among the staff at work or from employees at home. And, in the event they cannot find volunteers, they call the DON or the administrator who makes the decision. It is only when these procedures are unavailing that an RN would find it necessary to require an employee to work overtime. Thus, the authority to require employees to work overtime is limited, and there is no evidence that such authority is regularly exercised. Second, and more significantly, the decision on whether additional staff is needed does not require independent judgment, but is in the nature of a clerical task. Determining whether additional staff may be needed to meet established minimal staffing

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Board authority. However, in this case without regard to burden, my conclusions would be the same.

<sup>8</sup> This testimony was not rebutted by the Employer.

requirements is not much more complex than counting heads. An RN's compelling an employee to work overtime is not only an apparently infrequent event, but is similarly in the nature of a clerical function. It is merely recognition that a decision must be made to assure that minimal and necessary staffing requirements, as measured against an established standard, will be maintained and, as such, does not require the exercise of independent judgment or discretion. *Id.* at 891.

In *Washington Nursing Home*, 321 NLRB 366 (1996) (discussion of charge nurse, some of whom are RNs), the Board affirmed the administrative law judge's supplemental decision finding employee status. The judge synthesized Board precedent and considered many of the factors found herein. He noted:

There [*River Chase Health Care Center*, 304 NLRB 861 (1991)] the Board also found that the authority to call in replacements from a list of approved aides, request, but not require, aides to work overtime, or to transfer aides to different wings of the facility where circumstances required, to initial timecards and verify attendance when an aide neglected to punch the timeclock, or to request aides to postpone or reschedule breaks all in order to ensure adequate staff coverage, involved only the exercise of routine judgment and did not align the charge nurses with the Employer. See also *Health Care Corp.*, 306 NLRB 63 (1992); *Phelps Community Medical Center*, *supra*, [295 NLRB 486, (1989)] *Waverly-Cedar Falls Health Care* 297 NLRB 390 (1989); and *Beverly Manor Convalescent Centers*, 275 NLRB 943 (1985). *Id.* at 378.

The same conclusion is appropriate here.

### **RN supervisors do not discipline employees.**

The Employer asserts RN supervisors have the authority to verbally and in writing discipline employees. Additionally, the Employer claims “. . . the RN Supervisor has the authority to suspend an employee. . . .” The record reflects that both RN supervisors and charge nurses issue verbal warnings. First, authority to give verbal warnings that do not result in any adverse action “does not evidence supervisory status.” *Washington Nursing Home supra*, at 380; See also *Illinois Veterans Home at Anna L.P.* *supra*, at 890; and *Ten Broeck Commons*, 320 NLRB at 812.

The record contains no written warnings or write-ups prepared by any RN supervisor. Thus, there is no evidence that RN supervisors have actually issued written “discipline.” Testimony in the record reflects that RN supervisors have prepared written statements for the DON’s consideration but this appears “merely reportorial and not indicative of supervisory status.” *Illinois Veterans Home* at Anna L.P. supra, at 890. The evidence presented reflects RN supervisors have been directed by the DON to consult and receive direction before taking any significant action involving a CNA.

The record reflects in circumstances such as patient abuse an RN supervisor could send an employee home. These events are immediately reported to the DON and are independently investigated. . . . “[T]he limited exercise of such authority, particularly when it is limited to ‘flagrant violation[s] of common work conditions, such as being drunk, is insufficient by itself to establish supervisory status.’ ” *Washington Nursing Home*, supra at 380. See also my Supplemental Decision in *Gran Care, Inc.* 30-RC-5576 et al 323 NLRB No. 85 (1997) (Summary Judgment) enfd. an banc. 170 F.3d 662 (7<sup>th</sup> Cir. 1999). The evidence of discipline presented herein is insufficient to establish supervisory authority.

**The RN Supervisors’ Participation in the Evaluation Process Does Not Reflect Supervisory Status.**

The Employer asserts the RN supervisor’s preparation of employee evaluations reflects supervisory status. It appears that the Employer recently (March 1999) resurrected an evaluation procedure for employees. RN supervisors received no detailed instructions regarding the evaluation process or the impact of evaluations.

Inasmuch as the record contains only a single evaluation and the process has just resumed the evidence is insufficient to establish supervisory status. Moreover, the record reflects that CNA pay raises are determined contractually, and LPN raises are determined by the DON in

consultation with the administrator. The evaluation form in evidence does not even contain a specific location for recommendation or a ranking. The mere completion of evaluation forms without more does not establish supervisory status. *Washington Nursing Home*, supra at 380, *Norwest Nursing Home*, 313 NLRB 491, at 498, fn 37, (1993).

### **Other Factors**

In evaluating the status of the RNs, I have considered certain other factors. There is no dispute that the LPNs who serve as charge nurses have “supervisory” responsibilities substantially the same as RN supervisors. The Employer concedes the LPN charge nurses are employees eligible to vote herein. The RN supervisors play no role in grievance adjustments.

In reaching my decision, I have also considered the similarities between the Employer and other nursing homes and how they operate. In a number of cases, RNs have been found to be supervisors, but credited testimony in this proceeding reflects the Employer, unlike other nursing homes, has failed to vest its RNs with supervisory authority. One employee with experience at other facilities testified, “At Hartford Care Center, they don’t give you that power [to reprimand]. They do not give you that authority to do that. They are in authority only.”

I also recognize if the RN supervisors are found to be employees, the ratio of employees to supervisor’s would be higher than is typical and at times no statutory supervisor would be at the facility. That factor however, does not alter my conclusion. Although not at present, the Employer traditionally operates with at least one DON and other RN administrators. The employment of individuals in those traditionally staffed positions will lower the supervisory-employee ratio. Additionally, the DON remains on-call and is regularly contacted if the need arises. Judge Miller in *Washington Nursing Home* supra addressed the Employer’s concerns regarding the absence of a statutory supervisor at the employer’s operation. He concluded:

The fact that the charge nurses are the highest ranking individuals on site during most of the second and third shifts is some indication as to the likelihood of supervisory status. It is negated, however, by the fact that Respondents policy manuals give detailed instructions covering most situations. Moreover, during those primarily quite hours, admitted supervisors are on call and immediately available by telephone. *Waverly-Cedar Falls Health Care*, supra. And *Phelps Community Medical Center*, supra. It cannot support a finding of such status where the statutory indicia are lacking. As the Board has recently stated: [T]he Act does not state or fairly imply that the highest ranking employee on a shift is necessarily a supervisor.” *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993) *Washington Nursing Home*, supra. at 381.

Based upon all the foregoing, I conclude the RN supervisors are employees within the meaning of the Act and are entitled to vote in the elections I am directing.

### **The Graduate Nurse and the Restorative Nurse:**

Given my conclusion set forth above, I include the graduate nurse like the other RNs in the voting group described below. The Board has traditionally included such employees with other RNs in a voting unit. *Mercy Hospitals of Sacramento, Inc.* 217 NLRB 765, 768 (1975). (See the discussion regarding nurse permittees).

Regarding the restorative nurse, the Employer asserts “[T]he supervisory authority, she [the restorative nurse] possesses is similar to that accorded the RN supervisor.” Given my conclusions regarding that authority set forth above, I conclude the restorative nurse Linda Boudry is eligible to vote in the election directed herein. Inasmuch as she is an LPN she will be included in “LPN” unit described below.

### **The Appropriate Units:**

Neither the record nor the parties’ briefs contain any specific treatment of the professional status of the RNs, nor is there discussion as to what unit or units or voting groups may be appropriate in this matter. The record does establish the RNs are graduates of nursing schools. It appears that their nursing degrees qualify them to perform the same duties as any other registered nurses licensed by the State. The record reflects based upon their status they



perform vein punctures (IV's). They are also generally paid a higher wage rate than LPNs because of their higher qualifications and because they possess a higher level of skills. Consistent with Board precedent I conclude the "RNs" fulfill the criteria of professional status under the Act. *Centralia Convalescent Center*, 295 NLRB 42 (1989).

Under the proscription of Section 9(b) of the Act, professional employees cannot be included in a non-professional unit without their consent. They are entitled to the benefit of a *Sontone* election to determine if they wish to be included with non-professionals. *Sonotone Corp.* 90 NLRB 1236 (1950). In this case it appears that the RNs (and graduate nurses) could constitute a separate appropriate unit based upon their education, training, duties, wages and working conditions. They also share a substantial community of interest with the LPNs including the restorative nurse and could be included in an overall unit. Thus, I find two separate units or one combined may be appropriate.<sup>9</sup>

Based upon the foregoing and to ascertain the desires of the professional employees as to inclusion in a unit of non-professional employees, I shall direct elections in Voting Groups A and B. Therefore, the following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

#### Group A

All full-time and regular part-time registered nurses including graduate nurses employed by the Employer at its Hartford, Wisconsin facility; but excluding all office and clerical employees, confidential employees, all other employees, guards and supervisors as defined the Act.

#### Group B

All full-time and regular part-time licensed practical nurses including the restorative nurse employed by the Employer at its Hartford, Wisconsin facility; but excluding all office and clerical employees, confidential employees, all other employees, guards and supervisors as defined the Act.

The employees in Voting Group A will be asked two questions on their ballot.

1) Do you wish to be included with the LPNs in Voting Group B in a single unit for the purpose of collective bargaining;

2) Do you wish to be represented for the purposes of collective bargaining by Service Employees International Union, Local 150, AFL-CIO.

If a majority of the RNs in Voting Group A vote “yes” to the first question, indicating their wish to be included in the same unit with the employees in Voting Group B, they will be so included. Their votes on the second question will then be counted together with the votes of the LPNs, Voting Group B, to decide the bargaining representative for the whole unit. If, on the other hand, the majority of the RNs in Voting Group A do not vote for inclusion with Voting Group B, they will not be included with the LPNs, and their votes on the second question will then be separately counted to decide whether they want to have the Petitioner to represent them in a separate unit.

The employees in the LPN unit, voting Group B will be polled only to determine whether or not they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 150, AFL-CIO.

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<sup>9</sup> A separate unit for LPNs has not been challenged by the Employer, and is urged as appropriate. There is no evidence of other technical employees properly included in such a unit.

If a majority of the employees in Voting Group (A) vote for inclusion in the same unit with the LPNs I find the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time registered nurses including graduate nurses and all full-time and regular part-time licensed practical nurses, including restorative nurses employed by the Employer at its Hartford, Wisconsin facility; but excluding all office and clerical employees, confidential employees, all other employees, guards and supervisors as defined the Act.

If the professional employees do not vote for inclusion in the same unit with the LPN nonprofessional employees, I find that Voting Groups A and B set forth above, constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among employees in the voting groups found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the

commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. In Voting Group B, those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Service Employees International Union, Local 150, AFL-CIO**. In Voting Group A, the same choice will appear, as well as the proposition set forth herein.

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before June 25, 1999.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by July 1, 1999**

Signed at Milwaukee, Wisconsin this 18th day of June 1999.

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Philip E. Bloedorn, Regional Director  
National Labor Relations Board  
Thirtieth Region  
Henry S. Reuss Federal Plaza, Suite 700  
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